Railway Wagon Co. v. *Maclure* (2) and *British Railway Traffic & Electric Co.* v. *Kahn* (3) are good examples, where the transaction in question has been held to be a genuine sale followed by a hire-purchase agreement, and, therefore, unaffected by the Bills of Sale Acts, and, on the other hand, there is the class, which includes *Re Watson, Ex p. Official Receiver in Bankruptcy* (4) and *Madell* v. *Thomas & Co.* (5), where the Court has held, on facts not very dissimilar from those in the present case, that the real transaction was one of loan, and, therefore, it was avoided by reason of the Acts. There is no doubt, I think, as to the deciding principle. The Court has to determine whether the transaction in question is a genuine sale by the original owner of the chattel to the person who is finding the money and a genuine re-letting by the latter to the original owner on hire-purchase terms, or whether the transaction, though taking that form, is nothing more than a loan of money on the security of the goods. It is perfectly clear from the judgments of Lord Esher M.R., in *Re Watson* (4) and in *Madell* v. *Thomas & Co.* (5) that that is the question which has to be determined. The Court is not to look merely at the documents. It must discover what the real transaction was."

Then Lord Goddard lays down the test which may be applied:

"It seems to me that one of the most satisfactory ways of deciding what the true nature of the transaction was is to see whether the documents themselves accurately set out the deal between the parties as it took place and at the time when it took place, or whether the facts, or some of them, therein recorded do not truly represent that which happened, but give the transaction what I may call an innocent appearance."

Applying this test, I have no doubt in my mind that the hire-purchase agreement of April 3, 1959 was a sham to disguise a money-lending transaction. The hocus-pocus that started with the telephone inquiry by the first defendant's manager Yeo Kean Teck from Wong of E.T.S. down to the fictitious transfers between April 2 and 7 were plainly maladroit attempts at camouflage. It is quite impossible to overlook one very cogent fact: that when the car was purported to have been sold by Cheong through the first defendant's servants to the first defendant it was throughout in the actual possession of the plaintiff. Furthermore, no responsible officer from the first defendant's office was called to testify to the transaction being a *bona fide* one of hire-purchase. This case therefore clearly is not one of the type of which Devlin J. said in *Eastern Distributors Ltd.* v. *Goldring; (Murphy, Third Party)* (6) as follows:

"There is nothing to prevent the owner of a vehicle from selling it to a hire-purchase company, pocketing the price and paying it back by instalments; and provided the sale is a genuine one and not a sham, effect will be given to it as a hire-purchase contract."

In my opinion the truth is as follows: Cheong was anxious to escape the burden of having to pay as much as $349 per month to E.T.S. His arrangement in January with the plaintiff had provided a temporary solution. Unfortunately, he preferred to use the moneys he received from the plaintiff for his own personal purposes, rather than to pay off the balance due to E.T.S. The notice of March 10, from Wong of E.T.S., however, compelled him to act. He therefore had to save the situation as best he could. He then went to the first defendant, whose manager devised the pseudo-hire-purchase agreement. The first defendant provided the money to settle with E.T.S. and Loke and Yeo were both servants and tools of their employers. Significant evidence on this point was given by Cheong who said that because E.T.S. was pressing him for payment he had to persuade the plaintiff to return him the car in March for the purpose of raising money thereon. It is therefore quite clear that Cheong agreed to transfer his car in any manner he might be directed to do so by the first defendant provided only that he was granted a loan by the latter on the security of his car on easier terms than his existing commitments to E.T.S. The entire transaction is consequently struck at by the Bills of Sale Ordinance, 1950. The result is that the so-called hire-purchase agreement is void, and no valid title to the car passed to the first defendant. As the plaintiff was in lawful possession of the car when it was seized by the first defendant without any lawful title the latter was guilty of trespass, and dealing with the vehicle amounted to conversion. Accordingly judgment in this action must be given for the plaintiff.

As to the order which I should make, I am in some difficulty on this score as no evidence has been given regarding the value of the car when it was seized by the first defendant. It is admitted to be in the possession of the second defendant but its condition might have deteriorated considerably between November 1959 and the present day, for which the plaintiff is not responsible. In all the circumstances therefore I think the appropriate order should be: that the said motor car be delivered up to the plaintiff; alternatively, and at the plaintiff's option, that the plaintiff recover against the defendants the value of the car which I would assess at $5,000. As to special damages, the plaintiff's claim appears to me to be grossly exaggerated. In any event it was his duty to mitigate his own loss and damage. I think $1,000 should be fair compensation. Costs follow the event.

Judgment for the plaintiff.

Solicitors: *Braddell & Ramani; Kam Woon Wah & Co.; Chooi Man Sou.*

PUBLIC PROSECUTOR v. PHEE JOO TEIK

[C.A. (Thomson C.J., Good J.A. and Ong J.) November 1, 1961]

[K.L. — F.M. Criminal Reference No. 1 of 1961]

Criminal law — Penal Code (Cap. 119), ss.161 and 165 — Obtaining bribe as public servant.

Town Councillor — Whether a 'public servant' within Penal Code — Whether the Butterworth Town Council was lawfully constituted.

The respondent in this case, a Town Councillor of the Butterworth Town Council, was charged under sections 161 and 165 of the Penal Code for obtaining a bribe as a public servant. A preliminary point was

raised on his behalf that a Town Councillor is not a public servant for the purposes of section 161 and section 165 of the Penal Code. The submission was accepted and an order of acquittal and discharge was accordingly made. On appeal by the Public Prosecutor,

Held: (1) a Town Councillor of the Butterworth Town Council is constituted a public servant by virtue of section 398 of the Municipal Ordinance, as amended by Federation of Malaya Ordinance, No. 53 of 1950, which reads that Councillors "shall be deemed to be public servants within the meaning of the Penal Code";

(2) the Butterworth Town Council was validly constituted by the Resident Commissioner, Penang, in pursuance of powers given him by section 399 of the Municipal Ordinance and as such, persons connected with the system of local government set up by the Ordinance are to be treated for the purposes of *inter alia* the criminal law as public servants.

Cases referred to:—

(1) *Institute of Patent Agents* v. *Lockwood* [1894] A.C. 347, 360.

(2) *M'Lennan* v. *MacMillan* [1954] S.L.T. 109, 112.

(3) *In re R.* [1960] 1 Ch. 730.

(4) *Blackpool Corporation* v. *Locker* [1948] 1 K.B. 349.

COURT OF APPEAL.

Syed Othman bin Ali (Deputy Public Prosecutor) for appellant.

R. Ramani (*Lim Cheng Poh* with him) for respondent.

Cur. Adv. Vult.

Thomson C.J.: The respondent to this appeal is a Town Councillor of the Butterworth Town Council and he was charged in the Sessions Court at Penang with offences of agreeing to accept and of obtaining a bribe as a public servant in contravention of section 161 and section 165 of the Penal Code. The details of the charges are not important at this stage. When he appeared to the charges he claimed trial and the preliminary point was then taken on his behalf that a Town Councillor of the Butterworth Town Council is not a public servant for the purposes of section 161 or section 165 of the Penal Code. That submission was accepted by the learned President who accordingly made an order of acquittal and discharge.

The Public Prosecutor appealed against that decision and in the event on 28th July, 1961, Rigby J. set aside the order of acquittal and discharge and ordered that the case be remitted to the Sessions Court to hear and determine according to law. A few days later he granted a certificate under section 34(1) of the Courts Ordinance and the appeal against the decision of the Sessions Court has accordingly come before this Court for re-hearing.

Sections 161 and 165 of the Penal Code create offences relating to the taking of bribes by public servants. A "public servant" for the purposes of the Code is defined by section 21 and it is common ground that a Town Councillor of the Butterworth Town Council or indeed any other Town Councillor does not fall within that definition.

It is, however, the case for the prosecution that a Town Councillor is constituted a public servant for the purposes of the Code by reason of the provisions of the Municipal Ordinance of the former Straits Settlements which is and at all material times has been in force in what is now the State of Penang and which has been extended to the rest of the country by Federation of Malaya Ordinance No: 3 of 1948.

This is said to arise in the following way. By a Notification dated 18th December, 1952 (Penang L.N. No: 371 of 1952) the Resident Commissioner, Penang, purported to establish "a Rural Board to be known as the Butterworth Town Council" in a specified area. He did so "in exercise of the powers conferred by section 399 of the Municipal Ordinance". By the same Notification he purported to apply and extend to the area in question a large number of provisions of the Municipal Ordinance including the provisions of section 398 and provided (paragraph 5) that in applying these provisions to the area the expression "Councillor" should be construed as meaning a member of the Butterworth Town Council.

Section 398 of the Municipal Ordinance, as amended by Federation of Malaya Ordinance No: 53 of 1950, provides that Councillors "shall be deemed to be public servants within the meaning of the Penal Code". The present respondent is a member of the Butterworth Town Council and it was therefore argued by the prosecution that he is a Councillor within the meaning of the Municipal Ordinance and that for the purposes of the Penal Code, and in particular for the purposes of sections 161 and 165, he is a public servant.

On the other side it was contended that what is called the Butterworth Town Council has never been legally established; that the Resident Commissioner, Penang, had no power to establish it as he purported to do; and that even if he had such a power he did not exercise it properly in the Notification he issued because he did not set out in full the chain of statutory authority which brought the power to him. It was further contended that even if he had power to establish a Rural Board he had no power to establish a Rural Board and call it by the name of a Town Council, and that in any event the provisions of section 398 did not apply to members of the alleged Rural Board even if it was established because these provisions by their nature were incapable of being extended to an area.

The questions thus in issue can best be answered in the light of an examination of the various statutory provisions involved.

Section 399 of the Municipal Ordinance occurs in Part XVII of that Ordinance which is entitled "Regulation of Districts not included in Municipalities". As originally enacted, the

section provided, and indeed still so reads, that the Governor-in-Council, which prior to 1st April, 1946, meant of course the Governor of the Straits Settlements in Council, "may by Notification in the Gazette create a Rural Board by such name as he thinks fit in any local area" and extend to such local area all or any of the provisions of the Ordinance and thereupon such of these provisions as are specified "shall apply and extend and may be enforced within any such local area".

The Executive Council's Powers Delegation Ordinance of the Straits Settlements (Cap. 5), which was repealed *quoad* the State of Penang in 1946, provided *inter alia* that the Legislative Council might pass a resolution to the effect that any powers vested in the Governor-in-Council under any Ordinance should in future be exercised by the Resident Councillor of Penang instead of by the Governor-in-Council and that any Ordinance dealing with such powers "shall be deemed to be amended accordingly". In 1941 a Notification was published in the *Straits Settlements Gazette* (No: S. 289) stating that the Legislative Council by a resolution of the 28th April, 1941, had resolved *inter alia* that the powers vested in the Governor-in-Council by section 399 of the Municipal Ordinance should in future be exercised in the Settlement of Penang by the Resident Councillor, Penang. By reason of Malayan Union Ordinance No: 2 of 1946 the Resident Councillor, Penang, later became the Resident Commissioner, Penang.

It is common ground that by virtue of the provisions which have thus been stated the powers of the Governor-in-Council of the Straits Settlements under section 399 of the Municipal Ordinance could have been exercised by the Resident Councillor, Penang, at any rate from 28th April, 1941, that is the date of the resolution, until 13th August, 1946, which is the date of the coming into force of the Delegation of Powers Ordinance, 1946 (Malayan Union No: 19 of 1946) which repealed *quoad* the then Settlement of Penang Straits Settlements Executive Council's Powers Delegation Ordinance (Cap. 5).

For the respondent, however, it was said that the effect of that repeal was to put an end to the power of the Resident Commissioner to create a Rural Board under section 399 of the Municipal Ordinance and that the power in that regard which had been transferred in 1941 to him from the Governor-in-Council of the Straits Settlements thereafter passed by a process of devolution which it is unnecessary to consider here in detail to the Governor-in-Council of the Malayan Union and later to the High Commissioner in Council of the Federation of Malaya by whom alone it could have been exercised on 18th December, 1952, the date on which the Resident Commissioner purported to exercise it by Notification No: 371 of 1952.

Here it becomes necessary to pause and consider just what happened when the Legislative Council passed the resolution of 28th April, 1941. One eventual result of that was that the power of the Governor-in-Council under section 399 of the Municipal Ordinance passed to the Resident Councillor. But the immediate cause of its passing, so to speak, was that when the Legislative Council said by resolution that the power should in future be exercised by the Resident Councillor then the Ordinance in question, that is to say section 399 of the Municipal Ordinance, "shall be deemed to be amended accordingly". The result was an amendment of the law and it was in consequence of that amendment that the power in question passed. The view that the words "shall be deemed to be amended accordingly" are apt to effect what is indistinguishable from an amendment of the statute to which the words refer finds support, if support be necessary, in certain observations by Lord Herschell, L.C., in the case of *Institute of Patent Agents* v. *Lockwood.*[1] His Lordship was there concerned with similar words in the Patents Act, 1883, section 101 of which provides that rules made by the Board of Trade under the Act "shall ..... be of the same effect as if they were contained in this Act".

With regard to these words His Lordship said:—

> "*I own*, I feel very great difficulty in giving to this provision, that they 'shall be of the same effect as if they were contained in this Act', any other meaning than this, that you shall for all purposes of construction or obligation or otherwise treat them exactly as if they were in the Act."

Again, in the Scots case of *M'Lennan* v. *MacMillan*[2] the Lord Justice-General, Lord Cooper, dealing with section 25(1) of the Road Traffic Act, 1934, which sets out the conditions on which a vehicle is to be "deemed" to be used on a special occasion, said this :—

> "I attach special significance to the word 'deemed' as excluding all inquiry into the question whether, independently of the new section, the same conclusion would have been reached. When a statute gives a definition and then adds that certain things shall be 'deemed' to be covered by the definition, it matters not whether without that addition the definition would have covered them or not, the classic instance being the provisions of the Finance Act, 1894, imposing estate duty, first, on 'property which passes on the death', and, second, on property 'deemed' so to pass. As Lord Macnaughton made plain in *Cowley*, [1899] A.C. at p. 211, the latter types of property are not all within the letter of the main enactment and do not 'pass' on death, but they are nevertheless caught within the net."

If then the effect of the resolution passed under the Executive Council's Powers Delegation Ordinance was to amend section 399 of the Municipal Ordinance that amendment was effected once and for all when the resolution was passed and could not in any way be affected by the later repeal *quoad* Penang of the Straits Settlements Delegation of Powers Ordinance by the Malayan Union Delegation of Powers Ordinance, 1946 (No: 19 of 1946). And it was by reason of that amendment that the power under the section was vested in the Resident Commissioner.

Even, however, if this view be wrong and if it be considered that the powers of the Governor-in-Council passed to the Resident Commissioner not by virtue of the amendment of section 399 of the Municipal Ordinance but by virtue of the resolution of the Legislative Council and that that resolution is to be regarded as some sort of subordinate legislation which unless expressly saved would, as the law stood in 1946, have come to an end by reason of the repeal of the statute under which it was made, it is clear that it would be saved by the proviso to the repealing section (section 8) which reads as follows :—

" Provided that any delegation made under any of the Ordinances or Enactments specified in the Schedule hereto shall, unless revoked or superseded, continue in force and be deemed to have been made under this Ordinance."

That proviso in effect says that where a delegation of power has been made under any of the Ordinances repealed by the section, which include the Delegation of Powers Ordinances of the Straits Settlements, the 1946 Ordinance itself is in future to be deemed to be authority for such a delegation having been made so as to enable it to continue in force until revoked.

Support for that view is to be found in the case of *In re R.*[3] That case concerned property vested in a trustee who was a criminal lunatic. Section 5 of the Trustee Act, 1850, empowered the Court to make a vesting order when a person was entitled to any stock jointly with a criminal lunatic. That provision was in substance re-enacted as regards any trustee who is a lunatic by the Lunacy Act, 1890 (sections 136 and 341) but section 340 of the latter Act provided that the Act should not extend to criminal lunatics. The Act concluded by repealing a number of Enactments including section 5 of the Trustee Act, 1850, subject to the following proviso :—

" Provided that this repeal shall not affect any jurisdiction or practice established, confirmed, or transferred, ... by or under any enactment repealed by this Act."

It was held that this proviso was sufficient to preserve the jurisdiction of the Court in the case of a criminal lunatic under the repealed section 5 of the Trustee Act, 1850. Collins, M.R., said this (at p. 736) :—

" There were one or two other cases cited which have an important application to the present case, that is to say, cases where you find in an Act a repealing clause followed by a saving clause. There you have to see how far the two enactments can co-exist. It seems to me that the principle laid down in those cases is applicable to the present case. And that principle is this: Where you have a repeal and you have also a saving clause, you have to consider whether the substituted enactment contains anything incompatible with the previously existing enactment. The question is, Aye or No, is there incompatibility between the two? And in those cases the Judges, in holding that there was a saving clause large enough to annul the repeal, said that you must see whether the true effect was to substitute something incompatible with the enactment in the Act repealed; and that, if you found something in the repealing Act incompatible with the general enactments in the repealed Act, then you must treat the jurisdiction under the repealed Act as *pro tanto* wiped out.

.....

In this state of the authorities it appears to me that there is enough here to enable us to hold that under this saving clause the useful jurisdiction under the Act of 1850 in the case of criminal lunatics has not been absolutely wiped out."

That passage is wholly in point here. There can in the nature of things be no incompatibility between a delegation of a power of the Governor-in-Council and the provisions of an Ordinance which is completely silent on that subject and only deals with powers of the Governor and the Chief Secretary.

What has been said concludes the main question at issue in the appeal and makes it clear that on 18th December, 1952, the Resident Commissioner, Penang, had power to establish a Rural Board for any area in the then Settlement of Penang outside the limits of the Georgetown Municipality.

The remaining questions which arise can be disposed of in a few words.

It is true that the preamble to Notification No: 371 of 1952 does not set out the chain of statutory authority by reason of which the Resident Commissioner had his powers and in particular does mention in terms the resolution of the Legislative Council of 28th April, 1941. The point is without substance. It might have been better if the preamble had been a little fuller. If it had been it might well have prevented the Sessions Court President from falling into the error into which he did fall. Nevertheless the only material question is whether or not the Resident Commissioner had the power to do what he purported to do, and having regard to the relevant statutory instruments the answer to that question is clearly in the affirmative. The case has nothing whatsoever in common with the case of *Blackpool Corporation* v. *Locker*[4]. The root of the trouble in that case was that the Corporation was relying on instruments which though of statutory force were not available to the subject or his legal advisers and which both the Corporation and the Government Department concerned had refused to disclose. There is nothing of that sort here. Everything is written in the books for all to read.

With regard to the argument that even if the Resident Commissioner had power to create a Rural Board he had not power to give it the name of the Butterworth Town Council, it is not very easy to see how this is relevant to the present proceedings. Section 399 gives him power to create a Rural Board "by such name as he thinks fit". Though there are no words that could be construed as a restriction in terms upon that general power of giving a name it is no doubt reasonable to suppose that what the Legislature had in mind was that the name should consist of the words "Rural Board" prefixed by some geographical appellation describing

the area for which the Board was established. But even if it were made out that the Resident Commissioner went beyond his powers in giving to this particular Rural Board the name which he did give it, on the face of it this does not detract in any way from the lawfulness of his action in establishing the Board. If it could be shewn that anyone had been injured, that there had been any deception, that there had been any lack of *bona fides*, then it may be that the establishment of the Board could have been attacked in some way. But there is nothing of the sort here and indeed the reason for giving this particular name is perfectly clear. On 13th April, 1953, the High Commissioner in Nominated Council made an order (L.N. No: 112 of 1953) under section 51 of the Local Authorities Elections Ordinance, 1950, the effect of which was that this particular Board by whatever name it had previously been called was thereafter to be called a Town Council by virtue of the provisions of the Local Authorities Elections Ordinance. It is reasonable to suppose that when he made his order of 18th December, 1952, the Resident Commissioner was aware that this step was in contemplation.

In any event:

> " What's in a name? that which we call a rose
> By any other name would smell as sweet;
> So Romeo would, were he not Romeo called
> Retain that dear perfection which he owes
> Without that title."

With regard to the contention that the provisions of section 398 (which apply not only to Councillors but also to the servants of Boards) are by their nature incapable of application to an area and that they are only capable of application to classes of persons, the point, again, is without substance.

Section 399(1) says that the Resident Commissioner may apply and extend to any local area for which he establishes a Board "all or any of the provisions of this Ordinance .....and thereupon such of them as are for the time being specified in any such notification as aforesaid shall apply and extend to and may be enforced within any such local area". In pursuance of that power the Resident Commissioner has applied in and extended to the area of the Butterworth Town Council a large number of the provisions of the Ordinance including those of section 398.

The object of section 398 clearly is to provide that certain persons connected with the system of local government set up by the Ordinance are to be treated for the purposes of *inter alia* the criminal law as public servants. In the circumstances to say that the provisions of the section are incapable of being applied to and so becoming the territorial law in an area in which that system of local government is brought into being under and by reason of the provisions of the Ordinance itself would be to defeat the remedy of the mischief of the statute.

For the foregoing reasons which substantially follow the reasoning of Rigby J. we allow the appeal and set aside the order of acquittal and discharge made in the Sessions Court.

Perhaps it should be added that we have not overlooked counsel's eloquent plea that to say that Town Councillors could be prosecuted for taking bribes would be in some way to imperil the very existence of the elective principle. We have, however, reflected on the Aristotelian distinction between polity and democracy and have restrained our tears.

Appeal allowed.

Solicitors: *Pillai, Lim, Lee & Hwang.*

COMPTROLLER OF INCOME TAX v. LEE BENG KONG

[O.C.J. (Syed Sheh Barakbah J.) November 11, 1961]

[Alor Star — Civil Suit No. 149 of 1959]

Practice and Procedure — Affidavit — Whether affidavit of merit — Failure to appeal against Income Tax Board of Review's decision — Additional assessment — Whether illegal or ultra vires — Whether final and conclusive — Income Tax Ordinance, 1947, s.80.

This was an application by the defendant by way of motion for an order that the judgment entered against him in default of his delivery of defence be set aside as he had a good defence on the merits and that the additional assessment raised against him was illegal and void. The defendant further requested that the judgment be set aside so that he could file a declaratory suit.

Held: the defendant's affidavit was not an affidavit of merit, and that there was nothing illegal or *ultra vires* in the plaintiff's action as he was acting within the scope of the Income Tax Ordinance, 1947.

Per Curiam: "Section 80 of the Income Tax Ordinance, 1947 states *inter alia* that where the amount of such chargeable income has been determined on objection or appeal, the assessment as made shall be final and conclusive for all purposes of this Ordinance as regards the amount of such chargeable income."

Cases referred to:—

(1) *Dyson* v. *Attorney-General* [1911] 1 K.B. 410.
(2) *Francis* v. *Yiewsley and West Drayton Urban District Council* [1957] 3 All E.R. 529.
(3) *Evans* v. *Bartlam* [1937] 2 All E.R. 646.
(4) *L.W. Cyris* v. *K.G.A. Gunadasa* [1955] M.L.J. 7.

MOTION.

Chang Min Tat for the plaintiff (respondent).

S. A. Raj for the defendant (applicant).

Syed Sheh Barakbah J.: This is an application by the applicant (defendant) by way of Motion for an order that the judgment entered against him in default of his delivery of a defence therein may be set aside on the ground that the applicant has a good defence to this action on the merits, and that the additional assessment raised on him by the respondent (plaintiff) is illegal and *ultra vires*. Applicant further